No. 15,004

IN THE

United States Court of Appeals

For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD.,
Libelant-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR RESPONDENT-APPELLEE.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
CHARLES P. MORIARTY,
United States Attorney,
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,
GRAYDON S. STARING,
Attorney, Department of Justice,
Proctors for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Constitutions

Statutes

Regulations

Miscellaneous

No. 15,004

IN THE

United States Court of Appeals

For the Ninth Circuit

WESTERN CANADA STEAMSHIP CO., LTD.,
Libelant-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR RESPONDENT-APPELLEE.

JURISDICTION.

The jurisdiction of the District Court is founded upon Article III, Section 2 of the United States Constitution, Title 28, U.S.C. section 1333(1) and the Suits in Admiralty Act, Title 46 U.S.C. section 742, and was invoked by a libel (R. 3) claiming damages arising out of a time charter party under which libelant's vessel, the SS LAKE SICAMOUS, was operated for the United States.

The jurisdiction of this Court rests upon Title 28 U.S.C. section 1291 by reason of a notice of appeal

given over objection, on ultimate issues of the case, where it was shown that such witnesses lacked the knowledge of facts necessary to qualify them to testify to such opinions.[5]

STATEMENT OF THE CASE.

On June 25, 1950, hostilities broke out between the Republic of Korea and the northern portion of Korea which had been under occupation by Soviet Russia. The United Nations Organization promptly intervened and called upon its members to supply armed forces to assist the Republic of Korea in resisting aggression. In response to this call, the United States made its armed forces in the Far East available to the United Nations and committed them to assist, under the United Nations Command, in the defense of the Republic of Korea. The United Nations Command was given to General Douglas MacArthur, who was at that time the Supreme Commander of the Allied Powers occupying Japan. American forces based on Japan proceeded to Korea in fulfillment of the commitments made to the United Nations, and the American forces, as well as other forces of the United Nations, continued to be based in Japan and were supplied and supported from Japanese ports (Finding XIII, R. 62). Japan at that time, and at all times material here, continued to be under

---

[5]See: *McAllister v. United States*, 348 U.S. 19, 99 L.ed. 20, 1954 A.M.C. 1999; *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 88 L.ed. 967 (1944); *Walton v. Wild Goose Mining & Trading Co.*, 123 Fed. 209 (9th Cir., 1903); *United States v. McCreary*, 105 F.2d 297 (9th Cir., 1939).

occupation and control jointly by a group of sovereign occupying powers (Finding XI, R. 62) which had accepted the surrender of Japan at the end of World War II.[6] Of all these facts the Court may and should take judicial notice. *Underhill v. Hernandez,* 168 U.S. 250, 42 L.ed. 456 (1897).

The requirements of war in Korea vastly increased the need for munitions in the Far East and the need for ships to carry them, and on July 7, 1950 the United States and appellant in this cause entered into a charter party (Lib. Exh. 1) with respect to libelant's vessel the LAKE SICAMOUS, under which the vessel was furnished fully manned with master, officers and crew, all the servants of appellant. The charter party provided in Article 5 (R. 98) that it was "for a period of about 120 days from the time of delivery of the vessel or to the termination of the voyage current at termination date". It is agreed by the parties that the charter party contemplated two round voyages from the west coast of the United States to the Far East with munitions of war (Finding IV, R. 59).

The charter party provided for charter hire at the rate of $1,125 a day and provided expressly, in Article 29 (R. 102-105) for revision of the rate of hire under changed circumstances which would clearly include any substantial rise in market rates. Revision under Article 29 is made conditional upon the making of a request prior to the date when revision is to be

[6]See *Anglo-Chinese Shipping Co. v. United States*, 130 Ct. Cl. 361, 127 F. Supp. 553, 1955 A.M.C. 858, cert. denied 349 U.S. 938.

the United Nations forces (R. 300), and taxing the ability of the Japanese ports to supply the forces in Korea, to receive equipment evacuated from Korea and to accommodate ships diverted from Korean ports closed by the rapid advance of the Chinese (Finding XIV, R. 63; R. 300, 301, 310, 339, 346, 349).

In this emergency, in which United Nations forces were in retreat, there was the greatest need for ammunition for the Air Force, which could still operate against the enemy, using rockets, such as the LAKE SICAMOUS carried, against massed troops (R. 324). Such ammunition therefore had the highest priority (Finding XV, R. 63; R. 303, 337, 347-348). Artillery ammunition for the ground forces, which was primarily useful while advancing (R. 329), was therefore plentiful and of a very low priority (Finding XV, R. 63; R. 302, 337, 347-348). In this situation the portion of the LAKE SICAMOUS cargo consisting of 5-inch rockets was therefore of the highest priority and the remainder of the cargo, being ammunition for the ground forces, was of low priority (R. 302-303).

The Port of Moji was in use particularly for high priority cargo because it was closest to the Port of Pusan and there was a daily shuttle service between the two ports (R. 304-305). On December 10, 1950, shortly after her arrival at Moji, the LAKE SICAMOUS was berthed, and her high priority air force rocket cargo, amounting to 2,800 tons, was discharged by December 12 (R. 204). She was then sent to Kure

to discharge her low priority cargo and arrived at that port December 13 (R. 207).

The Port of Kure, to which the LAKE SICAMOUS had been sent, was the headquarters of the British Commonwealth Overseas Forces and was generally under the control of those forces and not under forces of the United States (Finding XII, R. 62; R. 308, 323). In the emergency, because of congestion already existing at Yokohama, Moji and other ports of Japan (R. 346, 307-308, 311-312), certain facilities of the Port of Kure had been made available by the British commander for the purpose of discharging cargoes of American vessels (Finding XII, R. 62). American officers under the command of Colonel Sanderson, who testified on deposition, had been stationed there to facilitate the discharge of American vessels using the port (R. 308, 311, 346, 350-351). The port had only one dock and one railroad track and was very limited in barges (R. 308). In addition to American vessels, Kure had to accommodate with its one pier the vessels supplying the British Commonwealth forces, which had priority over those supplying American forces (Finding XII, R. 62; R. 322-323).

Kure was severely limited in the rate at which it could handle ammunition ships, not only by limitations on its basic facilities of every kind, but further, and because of this, by limitations on the amount of ammunition which could be allowed to accumulate in one place or be transported through a city or other

populous area at one time (Finding XIV, R. 63; R. 308-309, 317-319, 326). As a consequence, it was not uncommon in December 1950 and January 1951 for vessels to have to lie from 60 to 80 days in Kure before being discharged (R. 310), and the waiting periods in other ports were as long and sometimes longer (R. 306, 310, 338, 349). In this situation, the LAKE SICAMOUS was required to wait for the discharge of her low priority cargo until January 12 when she was berthed and discharge commenced (R. 208). Discharge was completed on January 19 (R. 209). On January 19 the LAKE SICAMOUS left Kure and she arrived at Seattle February 10, 1951 (R. 217) and was redelivered to libelant February 12, 1951 (R. 219). Throughout the period of the entire voyage, up to the date when the LAKE SICAMOUS sailed from Kure for Seattle and redelivery, the record discloses no protest whatsoever by libelant against operations at Kure or elsewhere.

On January 19, 1951, J. H. Winchester and Company, as agents for libelant, addressed a letter (Lib. Exh. 6, R. 119) to the Military Sea Transportation Service stating that since the vessel "is being retained on charter for about six months" the owners intended to claim an increase in charter hire. Neither the libelant nor its agent, however, submitted any other or more definite request for revision of the rate of hire, nor any of the documents or information required by Article 29 of the charter party (R. 102-105) to accompany such a request (Statements VII, VIII, IX and X of Respondent's

Request for Admission of Facts and Genuineness of Documents, R. 28, and Libelant's Answers thereto, R. 31).

The letter of January 19, 1951 from libelant's agents could not be and was not treated as a proper request for renegotiation of charter hire since it did not comply with Article 29 of the charter party and, accordingly, libelant's subsequent bill for charter hire at an increased rate was rejected by the Government Contracting Officer (Lib. Exh. 7, R. 121). Libelant subsequently filed its claim with the Comptroller General and it was denied by him upon the grounds: 1, that the libelant acquiesced in sailing the vessel on voyage number two by failing to protest even though it knew that even under normal conditions the voyage would run beyond 120 days; 2, that the delay during the voyage was caused by war conditions which could not be anticipated when the voyage began, and 3, that the charter party provided its own method of compensating the owner by increasing charter hire and the owner had failed to comply with it (Lib. Exh. 12, R. 130).

Thereafter the libel in this case (R. 3) was filed February 9, 1953, claiming damages for "failure of respondent to redeliver the vessel within the period of the charter" (Article VII, R. 6). At the trial libelant relied upon alleged delay in loading at Bangor, alleged delay because of the routing to the Far East given the vessel by the Naval Control of Shipping Office (R. 197-202, 261-267) and alleged delay in discharge at Kure. It is no longer contended by

appellant, as indeed it could not be, in view of the plain language of the charter, and the authorities,[9] that redelivery at the end of the second voyage, even though after 120 days, was a breach. What is more remarkable, however, is the abandonment, on this appeal, of appellant's contentions with respect to the routing of the vessel. This change of position, by which appellant waives claims of at least equal merit, such as it be, with the claims asserted here, affords an instructive example, as will be seen, of expanding the claim for damages by contracting the cause of action.

SUMMARY OF ARGUMENT.

This case arises from the attempt of a shipowner to secure more for the use of its vessel than the hire provided in the charter party after full performance of the charter and receipt of all its benefits, without any protest as to the actions which it now claims were breaches, but which were, in fact, the results of the acts of sovereign nations in the highest and most characteristic exercise of sovereign power.

I. Libelant seeks here to overturn the findings of the court below. Such findings may only be overturned on appeal where they are clearly erroneous. The findings complained of by appellant are founded

---

[9] *Straits of Dover S.S. Co. v. Munson*, 95 Fed. 690 (S.D. N.Y., 1899) aff'd 100 Fed. 1005 (2nd Cir.); *Dene Steam Shipping Co. v. Bucknall Bros.*, 5 Com. Cas. 372 (Q.B. 1900).

upon substantial and uncontradicted evidence and the refusals to find complained of are based upon absolute lack of admissible evidence, and such findings and refusals to find therefore, so far from being clearly erroneous, are clearly correct and inevitable.

II. The charter party, which contemplated carriage of munitions into a military zone, contained the unusual provision by which the usual "about 120 days" period was modified to extend to the end of the voyage current at the end of 120 days. The redelivery of the ship at the end of that voyage complied fully with the plain language of the charter so that there was, in fact, no breach by the Government. Not only did the charter provide in this way for the uncertainties of the voyage, but it also contained a provision, unusual in charters, for revision of charter hire to adjust any inequities which might otherwise result from the long and indefinite period. The charter party provided that appellant might request negotiation of a new rate to be effective on a date to be specified, not earlier than the request itself, such request to be accompanied by certain data and documents. No such request was ever made by appellant. Appellant therefore never became entitled to an increased rate of charter hire under the charter, and since there was no breach by appellee, appellant can not obtain an increased rate by the device of a claim for damages.

III. The judge correctly refused to adopt the only testimony of unreasonable delay in loading at Bangor which was opinion testimony on the ultimate issue

given over objection by witnesses who were shown not to be qualified. Appellant, having its own master in charge and present at all times, knowing at the time of sailing that even under normal conditions Voyage 2 would extend far beyond the 120 day period, though not beyond the charter period, which by express definition ran to the end of the voyage, made no protest and did not seek to withdraw and thus waived any previous delay and elected, under familiar principles, to go on under the charter. Upon the arrival in Japan of the LAKE SICAMOUS the conditions of her discharge were the effects of military reverses which were not foreseeable when she sailed, and only after she was permitted by the military situation to discharge was she able to return for redelivery, so that the trial judge correctly found that the loading in Bangor was not shown to have caused any delay in redelivery, such cause being too remote.

IV. The trial judge correctly found that the vessel was discharged as soon as facilities were available in accordance with military priorities and the urgent needs of the armed forces engaged in hostilities in Korea, based on the evidence that sudden and catastrophic military reverses had crowded the ports and overtaxed discharge facilities and that the emergency had made most of the vessel's cargo suddenly unusable and therefore of relatively low importance. Acts and decisions of the military authorities in this situation are the plainest and most characteristic of the sovereign acts which, under our law, excuse delay in the performance of contracts, and the Government

cannot be held for the consequence of such actions. In all the existing facts and circumstances, the charterer exercised reasonable diligence and so met the very standard urged by appellant in this case. Finally, after the delay at Kure the appellant continued to elect to proceed under the charter and expressly indicated that it was still in force.

V. Appellant has inflated its damage claim by exaggerating the market rate of charter hire shown to be effective on the date when appellant contends its vessel should have been redelivered. The rate shown by the record was only $1,433.68 per day as contrasted with the $1,791.67 rate claimed by appellant. Moreover, appellant, by shrewdly abandoning its claim of delay in the routing of the vessel, adjusts the date when it contends its vessel should have been redelivered out of a period when the market rate was $1,164.94 per day and into a period when it was $1,433.68 per day and thereby increases its total claim from less than $2,000 to the exaggerated figure claimed in appellant's brief.

ARGUMENT.

I.

THE FINDINGS OF THE COURT BELOW MAY NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

In this appeal, appellants seeks, as it must if it is to prevail, to overturn the findings of the court below which are fully supported by the evidence. Appellant evidently recognizes the rule of *McAllister v. United*

States, 348 U.S. 19, 99 L.ed. 20, 1954 A.M.C. 1999, that findings may not be reversed unless they are "clearly erroneous" but subtly dilutes the rule by the suggestion that this Court weigh the "balance of probabilities" (App. Brief 17). No such weighing of probabilities is allowed by the *McAllister* case. As this Court has said, in *Bjornson v. Alaska S. S. Co.,* 193 F.2d 433, 1952 A.M.C. 477 (9th Cir., 1951), "clearly erroneous"

> ". . . does not mean that the reviewing court shall determine from the record where the weight of the evidence lies. It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence."

Findings are not clearly erroneous simply because a different conclusion might have been reached. *Pacific Portland Cement Co. v. Ford Machinery & Chemical Corp.,* 178 F.2d 541 (9th Cir., 1950). And, of course, where findings are not clearly erroneous the court must accept them notwithstanding that contrary evidence appears which was not adopted by the trial court. *Lerner Stores Corp. v. Lerner,* 162 F.2d 160 (9th Cir., 1947).

Appellant further seeks to suggest a rule of review based upon whether the evidence to be reviewed was given by deposition or in open court. This distinction, which was sometimes observed in the days of unlimited review of facts in admiralty appeals, is simply an expression of that practice of unlimited review, which, in turn, undoubtedly had its roots in

the practice of receiving all testimony in admiralty cases by deposition.[10] The *McAllister* rule makes no provision for a different standard of review of deposition evidence and the application of the old distinction as to depositions would be clearly in violation of the present rule.

II.

THE LAKE SICAMOUS WAS REDELIVERED TO APPELLANT IN PRECISE COMPLIANCE WITH THE PLAIN TERMS OF THE CHARTER PARTY AND APPELLANT HAS FAILED TO COMPLY WITH THE CHARTER PROVISIONS AFFORDING THE EXCLUSIVE MEANS OF INCREASING CHARTER HIRE.

At the time the LAKE SICAMOUS charter was entered into, the outbreak of war in Korea and the intervention of the United Nations forces and their subsequent progress had been the headline news of the preceding weeks. It is admitted that appellant, in making the charter party, contemplated the carriage of munitions of war for the armed forces engaged in hostilities in Korea (Finding IV, R. 59-60; R. 288-289). At this time appellant also knew, as did everyone else, of the occupation of Japan and of the United Nations military intervention in Korea (Findings IV, XI, XIII, R. 59-62). Appellant therefore must have known that its ship would fall under the control of the Supreme Commander, as agent of the United Nations, when she entered the theater of war in general

---

[10]On the earlier practice of taking all testimony by deposition see *Dowling v. Isthmian S.S. Co.*, 184 F.2d 758, 1950 A.M.C. 1876 (3rd Cir.).

and Japanese ports in particular. Moreover, it is a matter of public record, of which this Court may take notice, and which appellant is presumed to know particularly because of its experience in the shipping business, that, under war conditions, inadequate port facilities in the Pacific area seriously delayed ships from returning to the United States, and that even in United States ports the time spent before sailing on the next voyage averaged nearly a month at times during World War II.[11]

Against this background a charter party was made providing not for the usual fixed period of so many days or "about" so many days, but for a period of "about 120 days . . . or to the termination of the voyage current at termination date". It is obvious that such a charter was made precisely because of the unforeseeable length of a war voyage into the theater of operations. The period of the charter was so expressed in order that the termination of the charter, while not definite, would be capable of being made definite by events, without imposing upon the parties the hopelessly unrealistic considerations of overlap and underlap which, under appellant's view, would bedevil the parties in the uncertainty of wartime operations. The words of the charter party are plain and must be taken according to their plain and literal meaning, without interpretation. *Calderon v. Atlas S. S. Co.,* 170 U.S. 272, 280, 42 L.ed. 1033,

---

[11] *Report of the War Shipping Administrator to the President,* 45, (Washington, Government Printing Office, 1946).

1036 (1898); *Calmar S.S. Corp. v. Scott,* 345 U.S. 427, 435, 97 L.ed. 1125, 1134, 1953 A.M.C. 952, 959.

The LAKE SICAMOUS was redelivered at the end of her "voyage current at termination date" exactly as specified in the charter. Appellant now speaks of an "overlap voyage"; but there was no overlap voyage, the vessel having been redelivered exactly as provided in the charter party. The Government was entitled to the time needed to complete any voyage in progress at a date 120 days from the delivery date. This was the result reached, even in the absence of such clear language, by Judge Addison Brown in a case repeatedly cited as the foundation stone of the law of overlap. *Straits of Dover S. S. Co., Ltd. v. Munson,* 95 Fed. 690 (S.D. N.Y., 1899), aff'd 100 Fed. 1005 (2nd Cir.).

The same result was reached where a steamer was taken on a six-month charter providing that "Should the steamer be upon a voyage at the expiration of either of the within-named periods, the charterers are to have the use of the steamer at the same rate and conditions . . ." and was sent, over the owner's protest, seventeen days before the expiration of six months, on a voyage which was likely to and did extend the total charter period to eight months. In that case, *Dene Steam Shipping Co. Ltd. v. Bucknall Bros.,* 5 Com. Cas. 372, 376 (Q.B., 1900), the Court stated:

> ". . . In my opinion the defendants in entering into the charter party for the voyage from Barcelona were acting within the liberty given them

> by the charter party, and by the express terms of the contract they were entitled to complete that voyage on paying for the hire in accordance with the terms of the charter party. I think that it was contemplated by the parties when they entered into this charter party that hire would not only be for a period of about six months, but might be for such an extended period as might be necessary for the completion of a voyage, within the limits specified in clause 2, upon which the steamer might be engaged when the six months expired."

Because of uncertainty as to the length of time the ship might stay under charter, and to redress any inequities which might arise in the charter rate during a long period, the charter party provided, in Article 29 (R. 102), a mechanism for negotiation of a new rate. Under Article 29, such negotiations had to be requested by a "written demand" for a new rate to be effective not earlier than the date of the "written demand". It is explicit in Article 29 that such a written demand by the shipowner be *accompanied* by a number of specified data, and that only after the submission of the demand, accompanied by the required data, negotiations were to commence. Failure to agree in negotiations was to be resolved by resort to the "disputes clause" of the charter party. It is to be clearly understood, however, that since no proper demand was ever made by the appellant in this case and there were no negotiations, there is no "disputes clause" issue in this case. It is plain that appellant never made any demand under Article 29,

the letter of January 19, 1951 (Lib. Exh. 6, R. 119) not specifying any date in compliance with Article 29, and it is admitted that appellant failed to submit with the letter of January 19, 1951, or at any other time, the several data required by Article 29 to accompany a "written demand" (Statements VII, VIII, IX and X of Respondent's Request for Admission of Facts and Genuineness of Documents, R. 28, and Libelant's Answers thereto, R. 31).

The plain language of the charter party discloses a charter period which was fully and exactly complied with by the United States. There was no breach by the Government. In order to establish a breach appellant would have the court interpret the plain words of the contract to mean something different than they are. But the words being plain, there is no need of interpretation here and none can be permitted. *Calderon v. Atlas S. S. Co.,* 170 U.S. 272, 42 L.ed. 1033 (1898); *Calmar S.S. Corp. v. Scott,* 345 U.S. 427, 435, 97 L.ed. 1125, 1134, 1953 A.M.C. 952, 959.

III.

THE TRIAL JUDGE CORRECTLY FOUND THAT REDELIVERY WAS NOT DELAYED BY ANY INEXCUSABLE ACT OR OMISSION AT BANGOR.

A. The only evidence relied on by appellant as to the Bangor loading was inadmissible opinion which the judge correctly refused to adopt.

Appellant urges that the judge was in error in finding that "The redelivery of the LAKE SICAMOUS to libelant was not delayed by any inexcusable

act or omission connected with the loading of her cargo at Bangor." (R. 60). The evidence upon which appellant relies to refute this finding is inadmissible testimony of Captain Craig admitted over objection and properly not adopted by the trial judge.

Appellant urges in its brief that Captain Craig testified that the loading time at Bangor was unreasonable and further testified to his opinion of a reasonable time. Even if the witness had been qualified to testify to these opinions, it is elementary that the Court would have been free to reject them. *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 88 L.ed. 967, 972 (1944). Even more is this so where, as here, the witness was permitted to testify (R. 195-196) to his opinion on a question of reasonableness which was, according to appellant's own theory of the case, an ultimate issue as to which such testimony was plainly not admissible.[12]

On direct examination, Captain Craig was not shown to be familiar with the ammunition depot at Bangor or the character of operations or conditions prevailing there, and his opinion (R. 195-196) was given over the objection of respondent-appellee. On cross-examination it was shown not only that Captain Craig did not know the cause of any delay, as he repeatedly admitted, but that he had never been in the depot at Bangor, was not familiar with opera-

[12]*United States v. McCreary,* 105 F.2d 297 (9th Cir., 1939); *United States v. Stephens,* 73 F.2d 695 (9th Cir., 1934); *Gordon v. Robinson,* 210 F.2d 192 (3rd Cir., 1954); *Blackshear Mfg. Co. v. Umatilla Fruit Co.,* 48 F.2d 174 (5th Cir., 1931); *Hinds v. Keith,* 57 Fed. 10 (5th Cir., 1893).

tions there and was not familiar with any of the regulations or restrictions governing ammunition handling which might have affected the loading time there (R. 226, 244-245).

Captain Craig's opinion testimony was plainly not proper under the decision of this Court in a case strikingly parallel to this one where it was attempted to introduce testimony on the rate at which work could be done, by experts who were not in fact familiar with the location and actual conditions of the work. *Walton v. Wild Goose Mining & Trading Co.,* 123 Fed. 209 (9th Cir., 1903), cert. denied 194 U.S. 631. As this Court has pointed out in another case, *Kinney's Est. v. Commissioner of Internal Revenue,* 80 F.2d 568 (9th Cir., 1935), the opinion is not entitled to weight where, as here, it is not shown that the witness is basing it upon a full knowledge of the facts. In declining to adopt the opinion of Captain Craig, the trial judge, so far from committing error, took the only possible course.[13]

B. The loading at Bangor and sailing on Voyage 2 were acquiesced in by appellant and any delay was waived by its failure to protest and election to continue.

It is to be remembered that appellant furnished its vessel with its servant and agent, the master, in charge

[13]Evidently, appellant does not rely upon the opinion testimony of Captain Clarke, president of appellant corporation (R. 275), in view of the witness's having given negative answers to counsel's attempts to qualify him (R. 272, 274). In any event, Captain Clarke's disqualification upon the same grounds as Captain Craig's is fully shown (R. 272, 274, 281) and his opinion is entitled to no weight.

and fully manned with officers and crew all of whom were its servants; and that the master, officers and crew were present at all times material to this case and knew all the conditions that appellant now complains of. Certainly the shipowner knew, through its agent, the master (as in its brief, at p. 18, it urges that appellee knew), that the second voyage would be what appellant, in spite of the clear language of the charter party, chooses to call an "overlap voyage". Yet, after what appellant decries here as a breach of charter by delay in loading at Bangor, appellant and the master, who were in full communication, permitted the ship to sail on her second voyage November 10, 1950 without so much as a murmur of protest. So much is shown by the record (Finding VII, R. 61) and appellant does not appear to contend otherwise.

It is elementary contract law that, under a contract of continuing performance such as this, acceptance of acts of performance, failure to protest noncompliance with the contract and continued performance and acceptance of the benefits of the contract operate as a waiver and bar later damage claims.[14] *Swain v. Seamans,* 9 Wall. 254, 19 L.ed. 554 (1870); *Fairbanks Morse & Co. v. Nelson,* 217 Fed. 218 (9th Cir., 1914); *Stennick v. Jones,* 252 Fed. 345 (9th Cir., 1918), cert.

---

[14]The rule is no different in cases where the Government is one of the parties to the contract. *H. E. Crook v. United States,* 59 Ct. Cl. 593 (1924) aff'd 270 U.S. 4; *Dubois Constr. Co. v. United States,* 120 Ct. Cl. 139, 98 F. Supp. 590 (1951); *Murch Bros. Constr. Co. v. United States,* 81 Ct. Cl. 574 (1935); *S.A. Meagher Co. v. United States,* 73 Ct. Cl. 215 (1932).

denied 250 U.S. 664; *Pasquel v. Owen,* 186 F.2d 263 (8th Cir., 1950). As this Court said, in *Fairbanks Morse & Co. v. Nelson, supra,* at 221:

> ". . . it is . . . the generally accepted rule that a written contract may be waived in part or in whole, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive."

This general rule of law is applicable to charter parties as well as to other contracts. *The Tregenna,* 121 F.2d 940, 1941 A.M.C. 1282 (2nd Cir.) (Deviation waived by shipper who learns of it while voyage in progress and allows further performance without protest); *The Oregon,* 55 Fed. 666 (6th Cir., 1893) (Voyages slowed by towing other vessels and delay waived by failure to object); *Gilchrist v. Lumbermans Min. Co.,* 65 Fed. 1005 (6th Cir., 1895) (Delay waived). As the court said in *Eastern Transportation Co. v. East Carolina Lumber Co.,* 262 Fed. 195, 200 (E.D. Pa., 1920), a suit on a charter party:

> "A contract, even after one party is in default, is either on or off, and although the innocent party has the right of election, and although the right recurs at each succeeding default, it is a right which must be exercised during the life of the contract, and the election cannot be deferred until after the contract is at an end, and the rights of the parties have become otherwise fixed."

The doctrine of waiver has had particular application to delays in performance such as appellant charges here. *Fairbanks Morse & Co. v. Nelson,* 217 Fed. 218 (9th Cir., 1914); *The Sirius Star,* 196 F.2d 479 (7th Cir., 1952) (Construction of vessel delayed by war conditions; later assistance of other party in completing construction waived performance time); *Hayes Mfg. Corp. v. McCauley,* 140 F.2d 187 (6th Cir., 1944); *Peterson Steels v. Seidman,* 188 F.2d 193 (7th Cir., 1951); *American Surety Co. v. Scott,* 63 F.2d 691 (10th Cir., 1933). The language of the Court in *H. E. Crook v. United States,* 59 Ct. Cl. 593, 597, 598 (1924, affd 270 U.S. 4, is particularly applicable:

> ". . . It appears that the plaintiff, notwithstanding the breach of the contract on the part of the Government, went on with the work under the terms of the contract without making any demand upon the defendant . . . The plaintiff by its conduct waived the breach . . .
>
> "The plaintiff had the right, if it had chosen to exercise it, to refuse to go on with the work, but when it elected to proceed with the work and took no steps to protect itself against any extra expense which it might incur by reason of delay of the Government, and proceeded with the work under the contract, the parties stood in the same relation to each other when the contract was entered into . . .
>
> ". . . Having waived the breach, it cannot now be heard to ask for a change in the contract which will impose upon one of the parties the payment of an additional sum for the completion of the work."

Appellant in this case knew, when it entered into the charter party, that carriage of munitions into the war area was contemplated (Finding IV, R. 59) and, as an experienced ship operator, was plainly aware of the delays and difficulties which might arise in the theater of war as the voyage progressed. Through the master of the LAKE SICAMOUS and otherwise, appellant was thoroughly acquainted with all that took place before the ship commenced her second voyage November 10, 1950. Yet, in view of the facts it now complains of and the indefiniteness of a voyage in the war area, it not only made no effort to withdraw its vessel as it might have done[15] but uttered not even the slightest word of protest.

If any offer had in fact been made to appellant to charter its ship at a higher rate than it was receiving, it is certain that appellant would have exercised any right which it thought it had in the circumstances to protest the second voyage or withdraw its ship, but no such action was taken. It is plain that appellant enjoyed the charter and desired to go on under it and, as late as the day the ship left Kure to return to Seattle and redelivery, libelant expressly indicated, in a letter to the Government Contracting Officer, its understanding that the vessel was continuing under her charter (Lib. Exh. 6, R. 119). This expressed

---

[15] *Luckenbach v. Pierson,* 229 Fed. 130, 132 (2nd Cir., 1915). See *Britain Steamship Co. v. Munson Steamship Line,* 31 F.2d 530, 531, 1929 A.M.C. 442, 444 (2nd Cir.), cert. denied 280 U.S. 574; *The Rygja,* 161 Fed. 107, 108 (2nd Cir., 1908). Cf. *The Gazelle,* 128 U.S. 474, 32 L.ed. 496 (1888); *The Laurent Meeus,* 43 F. Supp. 807, 1942 A.M.C. 484 (S.D. Cal.) aff'd 133 F.2d 552, 1943 A.M.C. 415 (9th Cir.) cert. denied 318 U.S. 781.

understanding is in sharp conflict with the view that appellant may now recover a *quantum meruit.* Appellant cannot sharpen its pencil at the end of the voyage and the end of the charter and only then make its election according as events have shown where its greater advantage would have lain.

C. The loading at Bangor was not shown to have caused any delay in redelivery.

Even apart from the other considerations which compelled its finding regarding the loading at Bangor, the Court could not have found otherwise in view of the later developments on the voyage and in the absence of proof of any causal connection between the loading at Bangor and "delay" in redelivery, and of the amount of "delay" in redelivery so caused.

It is elementary that a party claiming damages for breach of contract must not only prove a breach, but also prove that the damage complained of was the natural and proximate consequence of that breach. *Louisiana Mutual Ins. Co. v. Tweed,* 7 Wall. 44, 52, 19 L.ed. 65, 67 (1869); *United States v. Chicago B. & Q. R. Co.,* 82 F.2d 131, 136 (8th Cir., 1936) cert. denied 298 U.S. 689 ("directly and in natural sequence"); *Driscoll v. United States,* 34 Ct. Cl. 508, 526 (1899), cert. denied 298 U.S. 689; *Myerle v. United States,* 33 Ct. Cl. 1, 27 (1897). As the court said in *Osage Oil & Refining Co. v. Chandler,* 287 Fed. 848, 852 (2nd Cir., 1923):

> ". . . The party complaining must show, not only only that he has suffered the loss, but also that it would not have been incurred, but for the

> wrongful act of his adversary; and the amount of the loss is as much to be proved by the plaintiff as the fact of the loss. . . ."

Where, as in this case, a new cause has intervened sufficient to explain the length of the second voyage so that it cannot be said that the alleged breach at Bangor caused any loss or how much loss it caused, the necessary showing of causation has not been made and there can be no recovery. As the Supreme Court said in *Louisiana Mutual Ins. Co. v. Tweed,* 7 Wall. 44, 52, 19 L.ed. 65, 67 (1869):

> "One of the most valuable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. *If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.*" (Emphasis supplied).

In the present case, where the time consumed in the Orient was due to adverse "fortunes of war,"[16] it is impossible to say that the ship would have returned any earlier had she sailed earlier from Bangor, or to speculate upon what date she might have departed Kure had she arrived on a different date than she did. It was presumably because of these very imponderables that the charter was written as it was, with its period not to expire upon a given date but to run until the end of the voyage. At all events, the appel-

---

[16]See *United States v. Caltex (Philippines),* 344 U.S. 149, 155, 97 L.ed. 157, 163 (1952).

lant, having decided, after the termination of the charter, that it might be to its advantage to claim that the ship was tardily laden at Bangor, did not—for it could not—show that it had suffered any loss because of the Bangor loading. The trial judge made the only finding he could, since the alleged delay at Bangor was too remote a cause, as a matter of law, under the holding of the Supreme Court in *Memphis & Charleston R. Co. v. Reeves,* 10 Wall. 176, 19 L.ed. 909 (1870), a case which affords a striking parallel to the present one.[17]

IV.

THE DISCHARGE PERIOD AT KURE WAS DUE TO THE ACTS OF SOVEREIGN NATIONS ENGAGED IN WARLIKE OPERATIONS FOR THE CONSEQUENCES OF WHICH THE UNITED STATES MAY NOT BE HELD LIABLE.

A. The trial judge correctly found that the vessel was discharged as soon as facilities were available in accordance with military priorities.

Appellant next attacks the Court's finding, supported by overwhelming evidence, that the LAKE SICAMOUS was discharged at Kure "as soon as dis-

---

[17]The case cited was a suit for loss of goods in the hands of a common carrier as the result of a flood where it was contended that the carrier was liable because of its improper delay in commencing the carriage, upon the ground that but for the delay the goods would not have been at the scene of the flood. The Supreme Court held that the cause of loss must be considered to be the flood, the delay being too remote. See also *Continental Grain Co. v. Armour Fertilizer Works,* 22 F. Supp. 49, 1938 A.M.C. 414 (S.D. N.Y.) (unreasonable delay in discharging under voyage charter followed by delay in sailing caused by intervening labor dispute); *Otis Elevator Co. v. Standard Constr. Co.,* 92 F. Supp. 603 (D. Minn., 1950); *Woodyard v. Barnett,* 335 Mich. 352, 56 N.W. 2d 214 (1953).

charging facilities were available, in accordance with military priorities then in effect and the urgent need of the armed forces engaged in hostilities in Korea." Appellant would reduce the serious world crisis, which determined the time of discharge of the LAKE SICAMOUS, into a simple matter of improvidently "ordering too many ships into the port" (App. Brief 26) and "lack of storage capacity ashore" (App. Brief 29) by plucking from the record bits of testimony as to the *effects* of the crisis and presenting them to this Court as the *causes.*

The record abounds with testimony to support the trial judge's finding as to delay at Kure. As Colonel Sanderson, who was over port operations at Kobe, and at Kure so far as American ships had the use of that port, testified concerning the Chinese offensive (R. 299-300) which began in November 1950 (R. 300):

> ". . . Their offensive was great and they swept down through. At the Port of Inchon the tonnage-handling capacities were reduced tremendously, and Pusan bore the brunt of all cargo going into our allied forces in Korea.
>
> "This necessitated what we called the operation 'Snap Back,' in other words, to get such equipment out of Korea and into Japan to be used at any other time when a second offensive would be initiated by the allied forces.
>
> "In conjunction and parallel with this operation many ships at sea destined for Korea were again diverted to ports in Japan and Okinawa."

The sudden and rapid retreat of United Nations forces which Colonel Sanderson describes, in addition

to reducing the available ports and causing congestion in those that remained, caused a serious change in the ammunition requirements. Artillery ammunition, which, as the colonel stated (R. 329), is primarily useful when you are advancing, was now superfluous. And airplane rockets of the type which formed the part of the cargo which was discharged early at Moji, and which were particularly effective against troop concentrations (R. 324) such as the United Nations forces were now faced with, were in great demand by the Air Force which, "using those rockets became the Army's artillery." (R. 325).

Appellant lays great stress upon lack of storage ashore as the cause of delay and, although it is not clear how this matter affected the real questions in this case, it may be well to refer to the record and correct the impression appellant would give as to storage. The testimony as to storage facilities in the record appears to be discussion of an incidental problem. On cross-examination by appellant's proctor, Colonel Sanderson made it clear that the delay was not a matter of storage space, but of movement of the cargo across the single pier, out of the pier area on the single railroad track, and through populous places where concentration of more than a certain small amount of explosives in a given area at any one time was not allowed (R. 317-318).

Upon a reading of the testimony of the Government witnesses it is clear that the cargo of the LAKE SICAMOUS was discharged in accordance with a system of priorities based, realistically, first upon the

need for the type of cargo, and second upon the length of time the ship had been in the theater. Under this system, high priority cargo was often discharged first and the ship then sent out to anchor to await later discharge of low priority cargo, just as was done with appellant's vessel. To all of this the witnesses, Colonel Sanderson (R. 304-306), Major Scales (R. 336-338) and Lieutenant Colonel Blust (R. 347-348) testified fully. And all of these officers testified that the wait of the LAKE SICAMOUS for discharge was by no means unusual, the waiting periods in Kure, and all other ports as well, being very commonly from 60 to 80 days (R. 306, 310, 338, 349).

Against this evidence appellant poses only the unsupported suggestion that its vessel was in some way discriminated against because she was not immediately discharged without regard for the needs of the military forces, and the bland suggestion, ingenuous in the light of the common experience of shipping in war, that a waiting period of 30 days would be "*ipso facto* unreasonable." Appellant, presumably willing to recognize the force of priorities for the prosecution of war, if applied by a local board or committee safe at home and far from the sound of the guns, places itself in the absurd position of refusing to recognize the ultimate priorities imposed by the tide of battle and enforced by the military commander in the field.

Finally, it is to be noted that even after the discharge at Kure, of which appellant now so bitterly complains, on January 19, 1951, the day the LAKE SICAMOUS sailed for home, appellant's agents, J. H.

Winchester & Co., wrote the Government Contracting Officer (Lib. Exh. 6, R. 119) a letter stating their intention to seek negotiation of a higher charter rate at a later date and indicating very plainly their understanding that the LAKE SICAMOUS was still operating under the existing charter. Such action is plainly inconsistent with the present attempt to seek a *quantum meruit*. Appellant's suggestion (Brief 38) that M.S.T.S. might have requested earlier discharge is naive. M.S.T.S. had no reason to make such a suggestion in the light of the charter terms and no justification for doing so in view of the military situation prevailing. The testimony of Colonel Sanderson on this point (R. 328) is not that he would have been able to do anything about such a request but simply as to how it might have reached him. The truly significant fact is not that M.S.T.S. made no request but that appellant itself made none, and appellant's master made none, although present and acquainted with the circumstances.

B. The United States may not be held liable for circumstances caused by military operations of sovereign nations.

It has long been settled, on the highest authority, that the act of a military commander in delaying a ship in a military port during war is a sovereign act for which damages can not be recovered against the United States. *United States v. Dickelman,* 92 U.S. 520, 23 L.ed. 742 (1876); *J. A. Zachariassen & Co. v. United States,* 94 Ct. Cl. 315, 1941 A.M.C. 1058, cert. denied 315 U.S. 815; *J. A. Zachariassen & Co. et al. v. United States,* ..... Ct. Cl. ....., ... F.Supp. .....,

1956 A.M.C. 1409, 1414. Cf. *Graham v. United States*, 2 Ct. Cl. 327 (1886). And nothing is better settled in the American law of contracts, maritime or otherwise, than the rule that prevention or interference by such sovereign acts excuses contract performance. *Texas Co. v. Hogarth Shipping Co.,* 256 U.S. 619, 631, 65 L.ed. 1123, 1131 (1921) ("compliance with the charter party was made impossible by an act of state."); *L. N. Jackson & Co. v. Royal Norwegian Government,* 177 F.2d 694, 1950 A.M.C. 80 (2nd Cir., 1949) cert. denied 339 U.S. 914 (compliance with directions of Maritime Administration as to loading). This rule does not depend upon the existence of a "restraint of princes" exception in the charter party.[18]

---

[18]Appellant's brief would suggest that the holding of the court below was placed upon the narrow ground of "restraint of princes", an exception of more importance in litigation arising in other countries where the general rule relied on by the judge below and by appellee here may not prevail. In any event the "restraint of princes" exception affords an independent ground of decision here. Under the exception, only compliance with the orders of those in authority is required, and no actual force need be applied or even be capable of being applied to the vessel. *British & Foreign Marine Ins. Co. v. Samuel Sanday & Co.* [1916] 1 A.C. 650, 669 (H.L.) ("restraint . . . imposed by political or executive acts . . . is not the less a restraint . . . because the master submits without opposition and without the presence of either actual or threatened force"); *Furness v. Redericktiebolaget Banco,* [1917] 2 K.B. 873 (master's refusal to violate decree which would subject him to penalties on return to home state); *Rickards v. Forestal Land, Timber and Railways Co.,* [1942] A.C. 50 H.L.) (acts of German masters in carrying out instructions to scuttle if unable to return home at outbreak of war); *Miller v. Law Accident Ins. Co.,* [1903] 1 K.B. 712 (refusal to land cargo contrary to orders of local department of agriculture). See *Battat v. Home Ins. Co.,* 56 F. Supp. 967, 1946 A.M.C. 1249 (N.D. Cal., 1944) (Norwegian ship turned back to Honolulu following Pearl

It is settled that the general rule is applicable where the performance of the Government itself is interfered with by sovereign act. The rule has never been more clearly stated than by the Supreme Court in *Horowitz v. United States,* 267 U.S. 458, 461, 69 L.ed. 736, 737 (1925), a suit for damages for the Government's failure to ship goods at the time promised because of a railroad embargo imposed by itself through the same department which made the contract. The Court said:

> "It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. Deming v. United States, 1 Ct. Cl. 190, 191; Jones v. United States, 1 Ct. Cl. 383, 384; Wilson v. United States, 11 Ct. Cl. 513, 520. In the Jones case, 1 Ct. Cl. 383, the Court said: 'The two characters which the Government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for the acts done in the other. Whatever acts the

---

Harbor in compliance with orders from British Royal Navy which had operational control of her).

The "restraint of princes" exception is applicable to the present case particularly under *Rodocanachi v. Elliott,* L.R. 9 C.P. 518 (Exchequer 1874), where delivery of cargo was interferred with by military activities, and *Adamson & Mail v. 4,300 Tons Pyrites Ore,* 137 Fed. 998 (E.D. S.C., 1905) where refusal of port authorities to let the ship berth in turn was held to be an "intervention of the constituted authorities". Under the decision of this Court in *The Laurent Meeus,* 133 F.2d 552, 1943 A.M.C. 415 (9th Cir.) cert. denied 318 U.S. 781, even the prior approval of the government to a charter does not make its subsequent interference any less a restraint.

> Government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons . . . In this Court, the United States appears simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.' "

The rule of the *Horowitz* case has been repeatedly and consistently applied before and since by the lower Courts. It governs the case of actual restraint of the contractor from performance by the military authorities, *Wilson's* case, 11 Ct. Cl. 513 (1875), as well as cases arising out of the wartime system of priorities and allocations. *Otis Williams & Co. v. United States,* 120 Ct. Cl. 249 (1951). *Alamo Construction Co. v. United States,* 116 Ct. Cl. 221, 88 F. Supp. 883 (1950). And it is a significant feature that a contractor knows, as here, that his contract is a war contract and that he may therefore encounter difficulties because of priorities or allocations. *Pearson, Dickerson, Inc. v. United States,* 115 Ct. Cl. 236 (1950). The priorities applied to the present case were not the result of estimates and computations at long range but were priorities in the most real and urgent sense, imposed by a military power, not only in military command of United Nations forces present, but also exercising

complete political authority over the territory as the agent of the occupying sovereigns.

Appellant demands evidence that the priorities at Kure applied to other ships than its own; but the plain testimony of the port officers on this point was that priorities applied to all ships (R. 304-306, 336-338, 347-348). And surely it is no objection, as appellant seems to suggest, that the priorities changed from time to time to reflect current needs! Any question whether the acts of the military authorities in the port were sovereign acts is certainly put to rest by *United States v. Diekelman,* 92 Wall. 520, 23 L.ed. 742 (1876), and *J. A. Zachariassen & Co. v. United States,* 94 Ct. Cl. 315, 1941 A.M.C. 1058, cert. denied 315 U.S. 815, where the acts of the port authorities were in fact directed at one vessel only.

As the Court said in the recent case of *Derecktor v. United States,* 129 Ct. Cl. 103, 113, 128 F. Supp. 136, 141, 1954 A.M.C. 1485, 1493, where the Government was held not liable for damages for the Maritime Administration's refusal to deliver a ship under a contract of sale until long after the contract date, because of a request from the State Department based upon the possible effect of the sale upon foreign relations:

> "The State Department's action was a sovereign act. It was, in effect, an embargo. It seems to have applied to only one ship. But we have no doubt that the same policy could have been applied to any other ship or owner if there had been probable cause to believe that it presented the same problem."

The Court went on to say:

> ". . . If there is any field in which the hands of the Government should not be tied, in which it should feel free to meet and solve problems without fear of being charged with breach of contract, that field must be peculiarly the field of international relations."

Surely the same observations may be applied with even more force to the conduct of war. There is no more characteristically sovereign pursuit, and it is undoubtedly out of the requirements of war that the broadest powers and immunities of the sovereign with respect to private interests have sprung.[19]

The acts of the executive, so long as they are done out of consideration of the general public good, are held to be sovereign acts excusing government performance even when they apply in fact only to the single contract in question; *Wilson's Case,* 11 Ct. Cl. 513 (1875); *Froemming Bros. of Tex. v. United States,* 108 Ct. Cl. 193, 70 F. Supp. 126 (1947) (Government diverted materials from contractor's use to uses of greater military urgency upon occurrence of Pearl Harbor); *Standard Accident Ins. Co. v. United States,* 103 Ct. Cl. 607, 59 F. Supp. 407 (1947) cert. denied 326 U.S. 729; *Derecktor v. United States, supra;* or to a group of similar contracts, with the

---

[19]Cf. *The Case of the King's Prerogative in Saltpetre,* 12 Co. Rep. 12, 77 Eng. Rep. 1294 (1606); *The Magdalen College Case,* 1 Roll. Rep. 151, 81 Eng. Rep. 394 (1615); *United States v. Pacific R. R. Co.,* 120 U.S. 227, 30 L.ed. 634 (1887); *United States v. Caltex (Philippines),* 344 U.S. 149, 97 L.ed. 157 (1952).

contracts used as a means of enforcing the restraint. *Barnes v. United States,* 123 Ct. Cl. 101, 105 F. Supp. 817 (1952); *E. & F. Constr. Co. v. United States,* 116 Ct. Cl. 512, 89 F. Supp. 541 (1950); *Clemmer Constr. Co. v. United States,* 108 Ct. Cl. 718, 71 F. Supp. 917 (1947). The matter is well summarized in the words of this Court in *Reconstruction Finance Corp. v. Chromium Products Corp.,* 202 F.2d 664, 667 (9th Cir., 1953) cert. denied 346 U.S. 819:

> "Such a Presidential restriction [with the operation of a particular Government contract so as to divert workers to 'critically needed' production] is as much a governmental operation as a Presidential order that soldiers should be removed from one field of battle to another."

The Court is not to look behind the decision of the military authorities in a matter of this kind. See *Hirabayashi v. United States,* 320 U.S. 81, 93, 87 L.ed. 1774, 1782 (1943).

Appellant relies heavily upon the standard laid down in *Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co.,* 77 Fed. 919, (8th Cir., 1896), a case where, contrary to the position of appellant here, the charterer was held excused of delay because of a strike in the port, and the standard laid down by dictum was that the vessel should be discharged in a reasonable time in view of all the existing facts and circumstances, ordinary and extraordinary, legitimately bearing upon the question at the time. Any "delay" to the LAKE SICAMOUS was not only contemplated but clearly proper, not only

upon the grounds set forth in the authorities cited above, but under the rule laid down in the *Empire Transportation Co.* case, which libelant has put forward as a measure of its own case. In *J. A. Zachariassen & Co. et al. v. United States,* ..... Ct. Cl. ....., ... F. Supp. ....., 1956 A.M.C. 1409, 1414, the court stated, concerning delays caused by exercise of discretion of military authorities in ports, that "While such delays are unfortunate, we believe in the circumstances of these cases, that they are inevitable in time of war . . ." and concluded that such delays were not unreasonable. The burden appellant assumes has not been borne.

V.

APPELLANT'S CLAIM OF DAMAGES IS GROSSLY INFLATED.

Appellant contends that the vessel should have been redelivered January 2, 1951 and claims at the unsupported rate of $1,791.67 per diem thereafter. Appellant's witness on market rates testified (R. 171-172) that the rate, on December 31, 1950, was $4.00 per ton, or $1,433.68 per diem, and on January 10, 1951, $5.00 per ton, or $1,792 per diem. He gave no testimony as to January 2 or any date between December 31 and January 10. So it appears that the only rate shown to be effective on January 2, 1951 was $1,433.68, at which rate appellant's entire claim would be at the rate of only $308.68 per diem instead of the $666.67 per diem now claimed.

Moreover, appellant, by an ingenious maneuver, characteristic of the opportunism of its entire case,

abandoned its claim for delay allegedly caused by the vessel's having been given a devious routing, (R. 197-202, 261-267) and thereby dropped about 7 days (R. 200-202) from its claim. Had it not abandoned this branch of the claim, its hypothetical redelivery date would be December 26, 1950. The highest market rate testified to by appellant's witness for this period was $3.25 per ton, or $1,164.94 per diem. Appellant's entire claim of damages figured at the resulting rate of $39.94 per diem amounts to less than $2,000!

Damages in the admiralty are given or withheld in the sound discretion of the Court. *The Palmyra,* 12 Wheat. 1, 6 L.ed. 531 (1827); *The Marianna Flora,* 11 Wheat. 1, 6 L.ed. 405 (1826). Based on gross exaggeration of damages alone, the Court would be justified in denying recovery in this case. Cf. *The Springbok,* 5 Wall. 1, 18 L.ed. 480 (1867).

CONCLUSION.

Appellant entered into a charter party with appellee under wartime conditions of which both parties were aware, it being contemplated by both parties that appellant's vessel, under the charter, would carry cargoes of munitions to the theater of war. The parties, so far from having overlooked the possibility of delay because of conditions well-known to exist at foreign war bases, had provided in the charter party that the period should run until the end of the voyage current 120 days from delivery, and the ship was re-

delivered in strict compliance with that provision. This is borne out by the acquiescence of appellant at every stage of the voyage, through its agent, the master, who was present and in charge and aware of conditions at all times.

The parties had provided a mechanism for revision of charter rates, which would operate to relieve libelant should the charter period extend so long as to make the stated rate inadequate. Libelant has utterly failed to seek a revision of charter hire in accordance with the remedy provided for in the charter party and, having ignored that remedy, cannot equitably be allowed to elect the law suit which that remedy was designed to prevent.

The redelivery of the vessel was made as promptly as was consistent with the period required for discharging by reason of supervening military considerations and sovereign acts of the United Nations and its component sovereigns in the conduct of war, behind which the Court is not free to look. All this is well shown by the uncontradicted evidence of military officers in authority in the ports involved. For the results of these sovereign acts, the United States cannot be held liable.

Finally, libelant has set up for itself a standard of proof which it has failed to meet. Libelant concedes that it has the burden of proving a lack of reasonable diligence in view of all the existing facts and circumstances, ordinary and extraordinary. Such circumstances include, of course, the military conditions and other circumstances of which there was abundant evi-

dence in this case. The libelant has signally failed to bear its burden of proof with respect to any period at issue in this case.

It is respectfully submitted that the decree should be affirmed.

Dated, August 20, 1956.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
CHARLES P. MORIARTY,
United States Attorney,
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,
GRAYDON S. STARING,
Attorney, Department of Justice,
Proctors for Appellee.